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Petitioner (In Pro Per)  
James E. Hendry ).  
2043 Lincoln St.  
Berkeley, CA 94709  
(415) 867-9596

**FILED**  
ALAMEDA COUNTY

JAN 14 2016

CLERK OF THE SUPERIOR COURT  
By **D. OLIVER** Deputy

SUPERIOR COURT, COUNTY OF ALAMEDA **16800-41**

James E. Hendry - Petitioner ) PETITION FOR WRIT OF MANDATE  
v. )  
City of Berkeley respondent ) (California Environmental Quality Act)  
\_\_\_\_\_)  
Hill Street Realty )  
Joseph Penner )  
HSR Berkeley Investments, LLC )  
and DOES 1 to 10; )  
Real Parties of Interest )

1  
2 **INTRODUCTION**

3 1. On December 8, 2015 the City of Berkeley ("City") approved the 2211 Harold  
4 Way Mixed-Use Project ("Project") on December 8, 2015. Contrary to the procedural  
5 requirements of the California Environmental Quality Act (CEQA), the Berkeley City  
6 Council not only approved the Project without any findings but appears to have added  
7 additional findings after approval.

8 2. The City, as the lead agency, violated CEQA requirements by its failure to  
9 properly evaluate the Project's significant impacts upon public transit, scope of the  
10 project, historical preservation, and consideration of alternatives. The adequacy of the  
11 EIR's description is closely related to the adequacy of the EIR's analysis of environmental  
12 impacts. See, County of Inyo v. City of LA, 71 Cal.App. 3d 185, 192-193.

13 3. City Respondent failed to make necessary findings and violated procedural  
14 requirements under CEQA. The approval of this Project constitutes an abuse of discretion,  
15 because the City extensively relied upon unsupported, outdated, inapplicable, or  
16 erroneous information that does not meet the substantial evidence standard required of  
17 CEQA. It is by definition an inadequate ["infill"] environmental impact report ("EIR").  
18 See, Berkeley Keep Jets Over the Bay Comm. v. Board of Port Commrs., 91 Cal.App. 4<sup>th</sup>  
19 1344(2001).

20 4. A major concern of the Petitioner is the Project's significant reliance on public  
21 transit, while at the same time adopting almost a cavalier attitude about its assumed  
22 availability. The stated goal of Berkeley's Downton Area Plan, as well as for this Project  
23 (based on the Statement of Overriding Considerations), has been to promote "transit  
24 friendly" development. The Project states it is providing state-of-the-art programs to  
25 encourage Project tenants to reduce car usage and use more public transit yet the EIR  
26 bases its estimates of transit usage on data from the 2000 U.S. Census, data that is now  
27 over fifteen years old. As a result, the estimated increase in public transit usage resulting  
28 from the project will be significantly higher than modeled.

5. The EIR assumes, without any substantial evidence, that public transit funding,

1 and hence availability, will continue at current levels, while overlooking the significant  
2 funding gap that the Bay Area's transit agencies are facing.

3  
4 6. Equally troubling, the EIR takes as a given, and not even a "significant effect"  
5 that the Project will add even more commuters to the Bay Area's already crowded transit  
6 systems. The EIR adopts a "threshold of significance" for public transit crowding that  
7 already exceeds targeted carrying capacity for BART trains set by BART and the federal  
8 Transportation Administration (FTA).

9  
10 7. The EIR also fails to conduct any cumulative effect analysis, basically  
11 concluding that once a commuter crosses the turnstiles at the Berkeley BART station the  
12 analysis ends. Overlooked is that those BART patrons will need to pass through an  
13 increasingly congested system in order to reach their destinations.

14  
15 8. A second concern in this Petition is the City's continued use of information that  
16 it has known to be inaccurate in assessing the economic feasibility of the Project  
17 alternatives as required by CEQA. Errors in this analysis were made known to the City  
18 soon after the City had completed its alternative analysis but have not been changed.  
19 Rather than change the analysis, which would have concluded that all three alternatives  
20 were economically feasible, the City continued to rely on these numbers. The City failed  
21 to address this issue in the appeal of the EIR to the full City Council, thus creating  
22 prejudicial error, and appears to have revised the EIR findings on this issue after rather  
23 than before voting on certification of the EIR, also a prejudicial error.

### 24 JURISDICTION

25 9. This Court has jurisdiction over the writ action under section 1094.5 of the  
26 Code of Civil Procedure, and sections 21168 and 21168.5 of the Public Resources Code.

27 10. This Court also has jurisdiction over the writ action under section 1085 of the  
28 Code of Civil Procedure and sections 21168 and 21168.5 of the Public Resources  
Code.

### PARTIES

1  
2 11. Petitioner James E. Hendry ("Petitioner") is a citizen, resident and homeowner  
3 in Berkeley, California since 2003 and previously resided in Berkeley from 1978 to  
4 1989. For the entire time he has resided in Berkeley he routinely takes BART into San  
5 Francisco for work. Petitioner strongly supports reasonable development, but agrees  
6 with concerns expressed by BART itself, that successful infill development must be  
7 matched by corresponding public transit services to meet increased demand. .

8 12. Respondent City of Berkeley, is a political subdivision of the State of  
9 California, and is the entity which approved the EIR and Respondent's 2211 Harold Way  
10 high rise complex. The City of Berkeley is the lead agency responsible under the  
11 California Environmental Quality Act (CEQA) for evaluating the environmental impacts  
12 of the project.

13 13. Respondent Hill Street Realty, "HSR Berkeley Investments, LLC," a Real  
14 Party in Interest, is a privately held real estate investment, management and development  
15 firm based in Los Angeles, California, founded in 2001. It was named on City agendas as  
16 a party having an interest by agreement or otherwise to a portion of the 2211 Harold Way  
17 "Project."

18 14. Respondent Joseph Penner, a Real Party in Interest, is the founder of HSR, and  
19 has been involved in the real estate industry in various capacities since 1990 including  
20 acquisitions, management, leasing, and financing in the United States and Europe. Mr.  
21 Penner has been referenced by the Project as the owner or primary investor of 2211  
22 Harold Way.

23 15. Real parties named as Does I to X are given fictitious names because their  
24 names and capacities are presently unknown to Petitioner.

25 **STATEMENT OF FACTS**

26 **City of Berkeley's Downtown Area Plan (Downtown Plan)**

27 16. On March 20, 2012, the Berkeley City Council adopted the 2012 Downtown  
28 Area Plan (Downtown Plan) by adopting Resolution 65648 – N. S.

1  
2 17. The purpose of the Downtown Plan was to develop policies to guide  
3 development in the Downtown Berkeley area with a strong emphasis on "transit friendly"  
4 development.

5 18. On March 20, 2012, the Berkeley City Council also approved the  
6 accompanying Final Environmental Impact Report (Downtown Plan EIR) given State  
7 Clearinghouse Number: 2008102032. Because the final approval of the Downtown Plan  
8 EIR was delayed by referendum (Measure R) most of the EIR's analysis is based on data  
9 from 2009 or earlier including the use of 2000 U.S. Census data for public transit usage.

10 **The Proposed Project and Changes to the Current Status of the Site**

11 19. The immediate area of the Project is the one block of the Downtown area  
12 bordered by Shattuck Avenue, Kittredge Street, Allston Street, and Harold Way.

13 20. On November 28, 2013 it was reported in the San Francisco Business Times  
14 that Hill Street Realty LLC (Respondent HSR) paid \$20 million or about \$217 per  
15 square foot for a 92,000 square foot office and retail complex. Tax records indicate that  
16 the purchase prices was \$19.6 million for 3 parcels located on the site of which only  
17 about 1/3 constitutes the Harold Way Project subject to the EIR.

18 21. As finally approved, the proposed Project would be a mixed-use development,  
19 18 stories in height, containing 302 dwelling units, approximately 10,877 square feet of  
20 ground-floor commercial space, a ten-theater cinema complex (approximately 641 seats),  
21 and 177 underground parking spaces.

22 22. Located on the site of the proposed Project is the Shattuck Hotel which was  
23 initially constructed in 1910 and subsequently expanded in 1912, 1913, 1926 and 1957 to  
24 essentially cover the entire block.

25 23. The entire Shattuck Hotel complex (including additions) was designated a City  
26 of Berkeley Landmark by the Berkeley Landmarks Preservation Commission ("LPC") on  
27 November 9, 1987.

1           24. The Project demolishes the 1926 addition to the Shattuck Hotel and partial  
2 removal of the 1913 addition to the Hotel which the City concedes in its findings  
3 constitutes a "significant and unavoidable impact."

4           25. The Habitot Children's Museum (Habitot) which provides educational  
5 opportunities for children receiving 66,000 visitors per year would also be forced to  
6 relocate by the project.

7           **Environmental Review and Project Approval Process**

8           26. The City has adopted a CEQA review process that attempts to coordinate the  
9 on-going review of projects amongst the various agencies and Commissions responsible  
10 for reviewing the Projects.

11           27. For the Harold Way Project, the City's Zoning Adjustment Board (ZAB) was  
12 the first to approve the EIR (June 25, 2015). The EIR is then relied on by other City  
13 agencies as necessary as part of their review. The Landmarks Preservation Commission  
14 (LPC), for example relied on the EIR as part of its review of alternatives (August 13,  
15 2015). After all agencies have made their necessary project approvals, the EIR is  
16 returned to the Zoning Adjustment Board to certify the EIR and grant overall approval (or  
17 rejection) a project.

18           28. ZAB certified the EIR on September 30, 2015.

19           29. As ZAB is a non-elected decision-making body, under CEQA any decision  
20 certifying an EIR can then be appealed to the agency's elected officials (in this case the  
21 Berkeley City Council.)

22           30. As a claimed "Infill EIR", the City relied on an Infill Environmental Checklist  
23 (CEQA Guidelines Appendix M) to determine that traffic and cultural resources needed  
24 to be addressed in the "Infill EIR."

25           31. A Draft EIR was prepared and released for comment and was approved by the  
26 Zoning Adjustment Board on June 25, 2015.

1  
2 32. On August 13, 2015 the Landmarks Preservation Commission (LPC) made  
3 findings required by CEQA regarding the feasibility of Project alternatives as well as  
4 approving the Structural Alternation Permit.

5 33. On September 30, 2015, the ZAB made CEQA findings and approved the  
6 Project including a determination regarding Significant Community Benefits.

7 34. On October 26, 2015 the appellant appealed the ZAB decision to the Berkeley  
8 City Council. Eight other appeals were filed, all but one filed by the Project developer)  
9 opposed the project.

10 35. At its December 8, 2015 City Council meeting, the City responded to the issues  
11 raised on appeal in a Memorandum to the Council (hereinafter Response to Appeals). In  
12 its Response to Appeals, the City responded to 51 issues raised on appeal but did not  
13 address either the City's reliance on erroneous and incorrect information to evaluate the  
14 feasibility of the CEQA alternatives or the issue of overburdening public transit.

15 36. Not included in any of the materials presented to the City Council prior to its  
16 certification of the EIR were any findings regarding the City's misplaced reliance on  
17 these erroneous and incorrect numbers used in the CEQA process.

18 37. On December 8, 2015 the Berkeley City Council voted to approve the Project  
19 and to certify the accompanying EIR.

20 38. After the City Council certified the EIR, there subsequently appeared a revised  
21 Exhibit A(a) that was not issued until after the City Council had certified the EIR.

22 39. The revised Exhibit A(a) incorrectly states that it is "readily ascertainable"  
23 from the EIR that the Project alternatives remain economically unfeasible.

24 **EXHAUSTION OF ADMINISTRATIVE REMEDIES**  
25 **AND INADEQUATE REMEDIES AT LAW**

26  
27 40. Petitioner objected to the Project in the administrative process.  
28

1  
2 41. Petitioner appealed the initial certification of the EIR by the Zoning  
3 Adjustment Board to the full Berkeley City Council and has now fully exhausted his  
4 administrative remedies.

5 42. Petitioner has no plain, speedy or adequate remedy in the course of ordinary  
6 law unless this Court grants the requested writs of mandate and injunctive relief. In the  
7 absence of such remedies, Respondent City's approval of the 2211 Harold Way Project  
8 would form the basis for a development project that would proceed in violation of state  
9 law.

10 43. Petitioner has complied with Public Resources Code section 21167.7 by  
11 filing a copy of this petition with the California Attorney General. A copy of that  
12 notice is attached as Exhibit A.

13 44. Petitioner has complied with Public Resources Code section 21167.5 by  
14 providing the City of Berkeley with notice of its intention to commence the action.  
15 Said notice is attached as Exhibit "B."

16 45. Petitioner elects to prepare the administrative record. A copy of that election  
17 is attached as Exhibit C.

18 **PREJUDICIAL ABUSE OF DISCRETION – GENERAL**

19  
20 **FIRST CAUSE OF ACTION**

21 **THE CITY PREJUDICIALLY ABUSED ITS DISCRETION IN**  
22 **THAT ITS ACTIONS IN ADOPTING AN EIR FOR THE HAROLD WAY**  
23 **PROJECT WERE ARBITRARY, CAPRICIOUS, IN EXCESS OF ITS**  
24 **JURISDICTION, ENTIRELY LACKING IN EVIDENTIARY SUPPORT, OR**  
25 **WITHOUT REASONABLE OR RATIONAL BASIS AS A MATTER OF LAW.**  
26 **THE CITY HAS ALSO PREJUDICIALLY ABUSED ITS DISCRETION BY NOT**  
27 **PROCEEDING IN A MANNER REQUIRED BY LAW, FOR THE PORTIONS**  
28



1                   **OF ITS DECISION THAT ARE NOT SUPPORTED BY FINDINGS, ARE**  
2                   **ERRONEOUS OR ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**  
3                   **(PUBLIC RESOURCES CODE SEC. 21000 ET SEQ, CALIFORNIA**  
4                   **CODE OF REGULATIONS TITLE 14, DIVISION 6, CHAPTER 3 (“CEQA**  
5                   **GUIDELINES”, CODE CIV. PROC., § 1094.5, SUBDS. (B) & (C)**  
6

7                   46. Petitioner incorporates all previous and subsequent paragraphs as if fully  
8 set forth.

9                   47. The inquiry for the issuance of a writ of administrative mandamus is whether  
10 the City prejudicially abused its discretion; that is, whether the agency action was  
11 arbitrary, capricious, in excess of its jurisdiction, entirely lacking in evidentiary support,  
12 or without reasonable or rational basis as a matter of law. (Code Civ. Proc., § 1094.5,  
13 subs. (b) & (c); *San Franciscans Upholding the Downtown Plan v. City and County of*  
14 *San Francisco* (2002) 102 Cal.App.4th 656, 673 [125 Cal. Rptr. 2d 745] (*San*  
15 *Franciscans*).

16                   48. A prejudicial abuse of discretion is established if the agency has not proceeded  
17 in a manner required by law, if its decision is not supported by findings, or if its findings  
18 are not supported by substantial evidence in the record. (*Id.* at p. 674.)

19                   49. When an agency fails to proceed as required by CEQA, harmless error analysis  
20 is inapplicable. The failure to comply with the law subverts the purposes of CEQA if it  
21 omits material necessary to informed decisionmaking and informed public participation.  
22 Case law is clear that, in such cases, the error is prejudicial.' " (*Protect the Historic*  
23 *Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1106 [11 Cal.  
24 Rptr. 3d 104].)

25                   50. CEQA requires the City to conduct adequate environmental review prior to  
26 making any formal decision regarding projects subject to the Act. (CEQA Guidelines, 14  
27 Cal. Code Regs. § 1500 et seq). A proper CEQA review requires objective findings to  
28 support approval,

1           51. CEQA imposes upon the City a clear, present and mandatory duty to certify an  
2 EIR only if the EIR fully discloses to the public the significant environmental effects that  
3 may occur.

4           52. The City has engaged in prejudicial abuse of its discretion by engaging in the  
5 acts listed above. The following causes of action list both general and specific instances  
6 where these violations have occurred.

7  
8 **PREJUDICIAL ABUSE OF DISCRETION REGARDING EVALUATION OF**  
9 **PROJECT ALTERNATIVES**

10  
11 **SECOND CAUSE OF ACTION**

12 **THE CITY RELIED ON CLEARLY ERRONEOUS EVIDENCE REGARDING**  
13 **THE ECONOMIC FEASIBILITY OF ALTERNATIVES TO THE PROJECT**  
14 **DESPITE REPEATED REQUESTS TO CORRECT THE RECORD; THUS ITS**  
15 **CONCLUSIONS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AS**  
16 **REQUIRED BY CEQA**

17  
18           53. Petitioner incorporates all previous and subsequent paragraphs as if fully  
19 set forth.

20           54. After the Zoning Adjustment Board (ZAB) approved the EIR on June 25, 2015  
21 the Landmarks Preservation Commission (LPC) evaluated the feasibility of the project  
22 alternatives as required by CEQA.

23           55. On August 13, 2015 the Landmarks Preservation Commission (LPC)  
24 conducted its alternatives analysis for the Harold Way Project. In rejecting the two other  
25 alternatives to the Project, the "preservation" and "contextual" in favor of the Project, the  
26 LPC relied extensively on a June 28<sup>th</sup> pro forma analysis provided by the applicant to  
27 conclude the alternatives were not economic. This analysis was then forwarded to the  
28

1 Zoning Adjustment Board (ZAB) which is the initial decision-making entity for CEQA  
2 purposes to certify the EIR.

3 56. Between the LPC's approval and the September 30, 2015 meeting at which  
4 ZAB approved the EIR, a number of problems were identified with the applicant's pro  
5 forma.

6 57. These problems included reporting the cost of land purchased for the project at  
7 \$40 million despite an actual purchase price of the land of only \$19.6 million of which  
8 only slightly over 1/3 of the purchased land was actually associated with the Project  
9 itself.

10 58. The pro forma also ignored clearly identified revenue streams such as parking  
11 (\$6 million net present value) and inconsistent use of rental rates which were set high for  
12 determining foregone revenues (for justifying community benefits) but then set low (for  
13 determining profit levels)

14 59. These inconsistencies were noted by many commenters as well as in comments  
15 from a ZAB Commissioner to the applicant at ZAB's September 10<sup>th</sup> meeting (the pre-  
16 meeting prior to ZAB's approval of the EIR on September 30<sup>th</sup>.

17 60. Even the Respondent's own follow-up letter to ZAB essentially admitted land  
18 costs were incorrect.

19 61. On September 30<sup>th</sup> a letter was sent from the Petitioner to the City Attorney  
20 and ZAB asking them to investigate the misstatements and whether the applicant violated  
21 the Berkeley Municipal Code's requirement that all applicant statements be complete and  
22 accurate.

23 62. The Petitioner also submitted a revised pro forma using the applicant's own  
24 methodology but correcting for the applicant's errors.

25 63. Under a revised and corrected pro forma, all three of the project alternatives are  
26 not only economically feasible but also meet the profit levels the Project developer has  
27 publicly testified are needed to make the project feasible.

1  
2 64. Despite the failure to address the shortfall in the record, ZAB on September  
3 30<sup>th</sup> certified the EIR.

4 65. The failure of ZAB to update the pro forma, and ZAB and LPC's incorrect  
5 reliance on the pro forma for evaluating the feasibility of the alternatives means that the  
6 City did not meet the substantial evidence standard needed to fairly and accurately  
7 evaluate the alternatives in violation of CEQA requirements.

8 **THIRD CAUSE OF ACTION**

9 **IN ITS FAILURE TO EVALUATE THE ACCURACY OF THE APPLICANT'S**  
10 **ECONOMIC DATA, THE CITY FAILED TO MEET THE REQUIREMENTS OF**  
11 **THE BERKELEY MUNICIPAL CODE AND THUS DID NOT PROCEED IN A**  
12 **MANNER REQUIRED BY LAW**

13 66. Petitioner incorporates all previous and subsequent paragraphs as if fully set  
14 forth.

15 67. The Berkeley Municipal Code Section 23B.24.030 requires that: "The  
16 applicant shall be responsible for the accuracy and completeness of all application  
17 information submitted to the City" and the Planning Department of the City of Berkeley  
18 is the entity responsible for enforcing the relevant provisions of the Berkeley Municipal  
19 Code.

20 68. By failing to exercise its authority to investigate the accuracy and completeness  
21 of the applicant's statements despite repeated requests to do so, and then to rely on that  
22 information for decision-making purposes, the City of Berkeley violated the Public  
23 Resources Code by failing to proceed in a manner required by law.

24  
25  
26 **FOURTH CAUSE OF ACTION**

27 **THE CITY DID NOT PROCEED IN A MANNER REQUIRED BY LAW BY**  
28 **FAILING TO RESPOND TO THE ISSUE OF THE CITY'S FAILURE TO**

1 **EVALUATE THE ACCURACY OF THE APPLICANT'S ECONOMIC DATA IN**  
2 **RESPONDING TO THE PETITIONER'S APPEAL**

3 69. Petitioner incorporates all previous and subsequent paragraphs as if fully set  
4 forth.

5 70. The failure of the Zoning Adjustment Board to update the pro forma in order  
6 to develop a complete and accurate evaluation of the Project's alternatives as required by  
7 CEQA was raised in the appeal to the City Council of the Zoning Adjustment Board's  
8 certification of the EIR.

9 71. This appeal also included a copy of the still unanswered letter to the City  
10 Attorney as well as the revised and corrected pro forma previously prepared by the  
11 Petitioner.

12 72. The City's Response to Appeals summarizing the issues raised on appeal did  
13 not address this issue among the 51 responses made by the City.

14 73. At the December 8<sup>th</sup> City Council meeting this issue was raised during public  
15 comment. In response to this comment, Councilmember Arreguin specifically asked if  
16 staff had performed any further analysis after the June 28<sup>th</sup> LPC meeting based on the  
17 corrected numbers. City staff responded that "No", no further analysis was done on the  
18 alternatives analysis.

19 74. By failing to respond to the Petitioner's appeal, the City did not proceed in a  
20 manner required by law.

21 **FIFTH CAUSE OF ACTION**

22 **THE CITY COUNCIL DID NOT PROCEED IN A MANNER REQUIRED BY**  
23 **LAW BY FAILING TO ADOPT NECESSARY FINDINGS BEFORE ADOPTING**  
24 **THE EIR, ONLY ISSUING REVISED FINDINGS AFTER THE EIR WAS**  
25 **ADOPTED**

26 75. Petitioner incorporates all previous and subsequent paragraphs as if fully set  
27 forth.

1  
2 76. Not included in any of the materials presented to the City Council prior to its  
3 certification of the EIR were any findings regarding the City's misplaced reliance on the  
4 erroneous and incorrect numbers used in the CEQA process.

5 77. Instead, all of the EIR and supporting documents continued to show LPC's  
6 previously performed alternatives analysis continuing to use the incorrect numbers.

7 78. It was only after the City Council certified the EIR, there subsequently  
8 appeared a revised Exhibit A(a) that was not issued until after the City Council had  
9 certified the EIR.

10 79. Revised Exhibit A(a) had now been changed to state that although no changes  
11 were made to any portion of the EIR or its accompanying documents, it now stated that it  
12 "could be ascertainable" from the record that the City's determination regarding the  
13 relative economic feasibility of the alternatives could be determined.

14 80. This statement is incorrect and contrary to the stated purpose of CEQA.

15 81. It is incorrect in that the supplemental information referenced in the Findings  
16 are insufficient to allow a reader to determine the feasibility of Project alternatives. The  
17 referenced material only offer some revised cost estimates (for which there is no  
18 supporting evidence thus making it uncertain if they qualify as "substantial evidence");  
19 only address cost issues, and do not address revenue streams that were missing from the  
20 original pro forma.

21 82. Nowhere in these supplemental materials is there a clearly defined revised pro  
22 forma showing calculations.

23 83. The supplemental materials also contain new and different assumptions making  
24 their use impossible. Did the City rely on the original 16% estimate of soft costs or the  
25 revised 22% figure in making its determination? The original 36% estimate of operating  
26 costs or the revised 35% (or the 30% estimate used in the same proceeding to determine  
27 the level of community benefits). What were the final profit levels determined by the  
28 analysis that would confirm the EIR's conclusions?

1  
2 84. This statement is thus contrary to the stated purpose of CEQA that the EIR is  
3 designed to be an informational document for public use, and should give the public and  
4 public agencies the information they need to make informed decision. (See In re Bay-  
5 Delta Programmatic Env't Impact Report Coordination Proceedings (2008) 43  
6 Cal.4th1143, 1162.)

7 85. More importantly, this statement is contrary to the goal of CEQA that an EIR  
8 should be written in a way that readers are not forced "to sift through obscure minutiae or  
9 appendices" to find important components of the analysis. (San Joaquin Raptor Rescue  
10 Ctr. v. County of Merced (2007) 149 Ca. App.4th 645, 659.)

11 86. Finally, CEQA requires that findings be made available before, not after,  
12 decision-makers vote to approve a project.

13 **PREJUDICIAL ABUSE OF DISCRETION RELATED TO THE EVALUATION**  
14 **OF PUBLIC TRANSIT**

15 **SIXTH CAUSE OF ACTION**

16 **THE "THRESHOLDS OF SIGNIFICANCE" USED TO EVALUATE THE**  
17 **EFFECT OF THE PROJECT ON PUBLIC TRANSIT ARE ASSERTED**  
18 **WITHOUT ANY, LET ALONE SUBSTANTIAL EVIDENCE TO SUPPORT**  
19 **THEM IN VIOLATION OF THE PUBLIC RESOURCES CODE AND CEQA**  
20 **GUIDELINES SECTION 15064.7**

21  
22 87. Petitioner incorporates all previous and subsequent paragraphs as if fully set  
23 forth.

24 88. The Downtown Plan EIR, as well as the Harold Way EIR, both establish  
25 "Thresholds of Significance" for determining if there is a significant effect on public  
26 transit.

27 89. These thresholds are asserted, without any supporting documentation or  
28 justification, and thus are not supported by substantial evidence.

1  
2 90. The capacity level of BART assumed for the EIR, for example, is higher than  
3 that used by either the Federal Transportation Administration (FTA) or BART itself  
4 which have significantly more expertise in this area.

5 **SEVENTH CAUSE OF ACTION**  
6 **THE FINDINGS OF "NO SIGNIFICANT EFFECT" FOR**  
7 **TRAFFIC/TRANSPORTATION EFFECTS ARE NOT SUPPORTED BY THE**  
8 **EIR'S OWN ANALYSIS**

9 91. Petitioner incorporates all previous and subsequent paragraphs as if fully set forth.

10  
11 92. The Harold Way EIR defines "Significant impacts to ridership capacity on BART"  
12 as...Increase[d] peak hour ridership on BART by 3% where the passenger volume would  
13 exceed the standing capacity of BART trains."

14 93. A correct reading of this threshold would be that a significant impact occurs when  
15 either; 1) transit ridership increases by 3%; or 2) transit ridership exceeds the capacity of  
16 the BART train.

17 94. The EIR appears to focus only on the first part. As long as ridership due to the project  
18 doesn't cause an increase in BART ridership, there is no significant impact.

19  
20 95. This latter approach excuses the Project from any responsibility for overcrowding on  
21 BART trains. There is a significant difference between having a system capacity increase  
22 from 90% to 93% versus system capacity increasing from 100% to 103%. In an airplane,  
23 for example, the first increase would be inconvenient, the second, by overweighing the  
24 plane, deadly.

25 96. The Harold Way EIR thus confuses the "metrics" of evaluation with the results. The  
26 purpose of the significant impact is to avoid BART exceeding its capacity. If the Harold  
27 Way project alone results in BART exceeding its capacity under optimistic conditions  
28 (i.e. full funding), then the cumulative effects of the Downtown Area Plan need to be



1 reevaluated for their effect on public transit and a finding of significance made. At the  
2 time the Downtown Area Plan was prepared BART may have had excess capacity to meet  
3 additional demand. As the Harold Way EIR concludes, it no longer does.  
4

5 97. Instead, the Harold Way EIR takes as a given that in 2020 BART "cars are  
6 forecast to operate over standing capacity"<sup>1</sup> yet somehow determines this is "not  
7 significant."

8 98. The Harold Way EIR posits that the Project will only generate seven additional  
9 commuters during peak hours. While, as noted below, this estimate is artificially low, it  
10 is unclear, according to the EIR itself, how even these seven expected commuters will get  
11 to work is not determined.

12 **EIGHT CAUSE OF ACTION**

13 **THE EIR'S BASELINE ANALYSIS OF EXISTING CONDITIONS FOR PUBLIC**  
14 **TRANSIT IS BASED ON 15-YEAR OLD DATA; IS INCONSISTENT WITH**  
15 **OTHER PARTS OF THE EIR AND DOES NOT ADEQUATELY REFLECT**  
16 **"CURRENT CONDITIONS" AS REQUIRED BY CEQA GUIDELINES SECTION**  
17 **15125**

18 99. Petitioner incorporates all previous and subsequent paragraphs as if fully  
19 set forth.

20 100. A critical part of the CEQA process is to determine the appropriate "baseline  
21 conditions" upon which a proposed project's effect on the environment can be compared.  
22 Under the Guidelines for Implementation of CEQA (Cal. Code Regs. tit. 14, § 15000 et  
23 seq.) (Guidelines), "the baseline 'normally' consists of 'the physical environmental  
24 conditions in the vicinity of the project, as they exist at the time ... environmental analysis  
25 is commenced ...'" (*Communities for a Better Environment, supra, 48 Cal.4th at p. 315,*  
26 quoting Guidelines, § 15125, subd. (a).)

27  
28 <sup>1</sup> IBI Group Report, Draft EIR, Appendix 3, p. 55

1           101. Critical to the effect of the Harold Way project on public transit is  
2 determining how many of the new trips that will be generated by the residents and  
3 customers of the Project will be made using public transit.

4           102. For the Harold Way project, the EIR assumes that only 13% (529 out of 4,048)  
5 of the new trips generated by the Project will be made using public transit. The 13%  
6 figure is taken from the 2000 Census data for Census Tract 4229 and Transportation Area  
7 Zone (TAZ) 733. This data is now over 15 years old and cannot be relied upon to  
8 establish current conditions.

9           103. In using 2000 Census Data, the EIR appears to have ignored newer data that  
10 better reflects current conditions and the significantly increased use of public transit  
11 within Berkeley. The Alameda County Congestion Management Agency (ACCMA)  
12 upon which the EIR claims to rely for forecasts of transit data (Draft EIR, Appendix C, p.  
13 20) identifies the use of two models to measure public transit usage (USEPA and MTC  
14 STARS) neither of which the EIR used. The EIR could have used updated Census data  
15 such as the 2006 American Communities Survey (ACS) which shows public transit usage  
16 in Berkeley at 17%. It must be remembered that this 17% figure is for all of Berkeley,  
17 from the hills to the Bay, and therefore is likely to significantly understate transit usage in  
18 the Harold Way Project located right on top of both BART and major AC Transit bus  
19 lines. 2010 data might also have been available. In any case the use of data from 2000,  
20 over 15 years ago does not meet CEQA Guidelines that the Harold Way Project's  
21 "baseline" for public transit usage is based on "current conditions."

22           104. Even the City appears to be distancing itself from the use of U.S. Census data.  
23 In its Response to Appeals (p.30). In response to the statement that "GreenTrip  
24 Certification is irrelevant and spurious because the data were insufficient. U.S. Census  
25 data are more accurate." (Issue 45), the City responded that "The ZAB specifically added  
26 Conditions of Approval 21, 53 and 63 regarding GreenTRIP Platinum Certification, and  
27 noted for a project of this scale and location, *this level of transportation demand*

1 *management should be standard... This was a policy decision made by the ZAB."*

2 (emphasis added).

3 105. If the City believes that all new projects, including the Harold Way Project,  
4 should be subject to this enhanced level of efforts to encourage public transit usage, than  
5 this is the baseline that should be used for determining how many of Harold Way's  
6 residents and customers use public transit. Thus, in addition to being outdated (by over  
7 15 years), the City's reliance on 2000 U.S. Census data to forecast public transit usage is  
8 internally inconsistent and erroneous.

9 **NINTH CAUSE OF ACTION**

10 **THE EIR'S BASELINE ANALYSIS OF EXISTING CONDITIONS**  
11 **FOR PUBLIC TRANSIT IS ERRONEOUS AS IT IS CONTRADICTED BY**  
12 **PREVIOUS EIRs PREPARED BY THE CITY OF BERKELEY AND DOES NOT**  
13 **ADEQUATELY REFLECT "CURRENT CONDITIONS" AS REQUIRED BY**  
14 **THE CEQA GUIDELINES**

15 106. Petitioner incorporates all previous and subsequent paragraphs as if fully set  
16 forth.

17 107. The EIR's analysis that 13% of net new trips from the Project will use public  
18 transit is based on "Year 2000 Census data collected for Census Tract No. 4229 [which]  
19 shows that the auto mode split in the project study area is 33% for trips generated by  
20 residential uses and 58% for non-residential" (Draft EIR, Appendix C)

21 108. The 13% figure appear to be erroneous and contradicted by the City itself. In  
22 2005 as part of its CEQA review and subsequent approval of a Mitigated Negative  
23 Declaration (MND) for the Oxford Way/David Brower Project, located less than two  
24 blocks from the proposed Harold Way Project, the same consultant (IBI Group), for the  
25 same lead agency (City of Berkeley) used data from the same "Census Tract 4229" to  
26 conclude that public transit ridership would be 20.5% of all trips, over 50% higher.  
27 (Oxford Plaza & David Brower Center Traffic Impact Analysis and Parking Study, Table  
28

1 3.7) used in support of City's MND review -- see Berkeley City Council Agenda Item  
2 July 25, 2005 Action Calendar). As the study further concluded; "Automobile residential  
3 trip generation rates comprise 33% of the total number of trips generated by the proposed  
4 residential uses. This figure appears to be reasonable given the transit oriented  
5 environment of Downtown Berkeley." The Harold Way EIR, by contrast, applied an  
6 assumption that 58% of all residential trips would be by car. (Draft EIR, Appendix C, p.  
7 29)

8  
9 **TENTH CAUSE OF ACTION**  
10 **FOR PURPOSES OF PUBLIC TRANSIT ANALYSIS – THE**  
11 **PROJECT DESCRIPTION IS INACCURATE AND FAILS TO REFLECT THE**  
12 **IDENTIFIED ACTIONS THAT WILL SIGNIFICANTLY INCREASE PUBLIC**  
13 **TRANSIT USAGE IN VIOLATION OF CEQA GUIDELINES THAT THE**  
14 **PROJECT BE ACCURATELY DESCRIBED**

15  
16 109. Petitioner incorporates all previous and subsequent paragraphs as if fully set  
17 forth.

18 110. Even if one were to accept the use of 2000 Census data to determine public  
19 transit usage within the Downtown area. The 13% figure is an average figure for all  
20 buildings within the Downtown area. Buildings that are closer to BART, such as Harold  
21 Way is would be expected to have higher transit usage. The Alameda County Congestion  
22 Management Agency's recommended MTC STARS model, for example, estimates that  
23 people living within ½ mile of public transit will use it for 25% of their trips (double the  
24 generic 2000 Census data estimate of 13%.)

25 111. Transform, the independent consulting group that provided the project with its  
26 GreenTrip Platinum designation states that people living near public transit are ten times  
27 more likely to use it.  
28

1  
2 112. According to the EIR, in order to have received its GreenTrip Platinum  
3 designation, the Project will have spent over \$5,000 per unit in specified incentives to use  
4 public and other forms of transit. (Response to Appeals, Response 46, p. 30). The  
5 significantly increased use of public transit resulting from this is neither described nor  
6 modeled in the EIR's analysis and cannot be compared to the generic 2000 Census Data  
7 which does not include the effect of these incentives.

8 113. The inconsistency between the EIR's estimate of public transit usage, and the actual  
9 amount of public transit usage that should have been evaluated within the EIR is further  
10 confirmed by the EIR's own parking analysis. The EIR's consultant (IBI Group) relied  
11 on the widely used URBEMIS model to determine parking needs associated with the  
12 project. Transform (the certifier of the project's GreenTrip Platinum status) also used the  
13 URBEMIS model for determining reduced car usage.

14 114. As the EIR concluded, based on the results of the URBEMIS model, the Harold Way  
15 Project would need 241 parking spaces to meet expected trip demand yet the City  
16 allowed the Project to only have 171 spaces or about 70% of what should be required.

17 115. In justifying this reduced level, the EIR itself recognizes the significant effect that  
18 the various Transportation Demand Management (TDM) measures incorporated in the  
19 project will have on reducing car usage and increasing use of public transit and other  
20 means. The EIR notes, for example, that the project's requirement for "unbundled  
21 parking" (i.e. parking spaces are rented separately and are not automatically provided as  
22 part of renting the apartment) alone) is estimated to reduce car ownership in the project  
23 by 25% to 30%. However, none of the cascading effect of the reduced level of car  
24 ownership is then reflected in increased use of public transit. The EIR as written is thus  
25 internally inconsistent.

26  
27 **ELEVENTH CAUSE OF ACTION**  
28

1                   **THE EIR ASSERTS THE FUTURE AVAILABILITY OF PUBLIC TRANSIT**  
2                   **CAPACITY WITHOUT ANY EVIDENCE OR SUPPORTING**  
3                   **DOCUMENTATION THUS FAILING TO MEET THE “SUBSTANTIAL**  
4                   **EVIDENCE” STANDARD REQUIRED UNDER CEQA AS WELL AS FAILING**  
5                   **TO DO ANY CUMULATIVE ANALYSIS .**

6  
7 116. Petitioner incorporates all previous and subsequent paragraphs as if fully set forth.

8 117. The Harold Way EIR assumes BART and AC Transit service continue at current  
9 levels despite significant evidence that both agencies face significant revenue shortfalls  
10 with BART's financial reports noting it has identified sufficient funding to meet only ½  
11 of its expected capital needs.

12 118. Insufficient funding results in less service and increased maintenance outages thus  
13 understates the EIR's assumptions about overcrowding on the BART system. .

14 119. The Harold Way EIR also only tracks public transit usage for BART at the Berkeley  
15 station. There was no analysis as to whether these commuters would be able to complete  
16 their trips due to congestion on other parts of the system or themselves impose congestion  
17 on other passengers.

18 120. The EIR is deficient in these respects as it is not supported by substantial evidence.

19                   **TWELTH CAUSE OF ACTION**  
20                   **THE EIR DID NOT RESPOND TO WRITTEN COMMENTS**  
21                   **ABOUT PUBLIC TRANSIT ISSUES IN RESPONDING TO APPEALS AS**  
22                   **REQUIRED UNDER THE CEQA GUIDELINES**

23 121. Petitioner incorporates all previous and subsequent paragraphs as if fully set  
24 forth.

25 122. In its Response to Appeals, the City did not address issues related to public  
26 transit raised in the appeal as required by CEQA Guidelines.

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28                   **THIRTEETH CAUSE OF ACTION**

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**THE EIR STATEMENT OF OVERRIDING CONSIDERATIONS IS  
NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

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123. Petitioner incorporates all previous and subsequent paragraphs as if fully set forth.

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124. The major goal of the Downtown Plan is to promote “transit friendly” and transit close development and to encourage people to use alternative means of transportation other than the car.

125. This concept is then carried over to the EIR’s Statement of Overriding Considerations where the concept of development close to transit is listed in many of the Project’s justifications for deciding that some environmental effects are “significant and unavoidable.”

126. As shown above, the success of transit friendly development can only happen if there is sufficient transit infrastructure and funding to accommodate this growth, an issue that the EIR fails to address.

127. Absent sufficient transit, the Project will not achieve its stated goals contained in the Statement of Overriding Considerations and thus is not supported by substantial evidence.

**FIFTEENTH CAUSE OF ACTION**

**ISSUES RELATED TO THE ENVIRONMENTAL EFFECTS OF  
RELOCATING EXISTING TENANTS (SPECIFICALLY HABITOT  
CHILDREN’S MUSEUM) FROM THE CURRENT HAROLD WAY SITE**

128. When it approved the Harold Way Project at its December 8, 2015 meeting, the City Council directly allocated \$250,000 of community benefits from the project towards relocating the Habitot Children’s Museum (Habitot) currently located on the site. This \$250,000 allocation was neither discussed nor included in any description or analysis of the Harold Way Project throughout the entire CEQA process until the December 8, 2015 meeting itself. The City has thus committed legal error by both failing

1 to include this allocation in its description of the Harold Way project as well as engaging  
2 in a discretionary act without performing any environmental review.  
3

4 129. As a claimed "Infill EIR", the Project is subject to CEQA Guidelines that in  
5 describing the project; "2) All answers must take account of the whole action involved,  
6 *including off-site as well as on-site*, cumulative as well as project-level, *indirect as well*  
7 *as direct*, and construction as well as operational impacts (Draft EIR, Appendix A, p. 55,  
8 listing Berkeley's responses to the CEQA Guidelines Appendix M "Infill Environmental  
9 Checklist" emphasis added).

10 130. The Harold Way EIR failed to evaluate, discuss, or even mention this aspect  
11 of the project. That the provision and use of community benefits is an integral part of the  
12 overall Harold Way project is clear from both the EIR's initial "Project Objectives" of  
13 "leveraging the full development potential under Zoning Ordinance standards in order to  
14 generate the revenue necessary to provide all of the community benefits envisioned in the  
15 Downtown Area Plan, plus additional community and public benefits proposed in the  
16 project application" (Draft EIR, Section 2.5 PROJECT OBJECTIVES, p. 2-57) as well as  
17 in the Statement of Overriding Considerations claim that the "Project will be required to  
18 provide Significant Community Benefits as per Berkeley Municipal Code Section  
19 23.E.68.090.E" (CEQA Findings, p. 32 – December 8, 2015),

20 131. The City's response to its failure to address this issue within the EIR process  
21 is both legally flawed and factually incorrect. The City states that; "The EIR did not need  
22 to specifically evaluate the community benefits for two reasons, both of which were  
23 explained at the June 25, 2015, ZAB hearing. First, potential community benefits that  
24 were under possible consideration at the time the EIR was published, such as renewable  
25 energy features, public open space, funding for enhanced cultural offerings or on-site  
26 affordable units, would not result in or lead to significant adverse impacts on the  
27 environment beyond those identified in the EIR as part of project construction and  
28 operation." (Appeal Response #5 p. 8).



1           132. This statement is legally incorrect in that it confuses when the draft EIR was  
2 “published” with when it was initially “adopted” on June 25, 2015 by ZAB. The entire  
3 purpose of publishing a draft EIR is to give the public the opportunity to comment and  
4 review on its deficiencies, one of which was its failure to consider community benefits.  
5

6           133. This statement is also factually incorrect in that the use of community benefit  
7 funds to relocate Habitot was under active, indeed many would say intense consideration,  
8 as far back as the City Council’s May 5, 2015 public hearing on defining the scope of  
9 “significant community benefits.” On June 25, 2015, the City Council, proposed a  
10 community benefits policy recommendation for ZAB (subsequently adopted by the  
11 Council on July 14, 2015) which specifically included the need to mitigate the effects of  
12 non-profits (of which Habitot was the only one specifically identified) affected by the  
13 Harold Way Project.

14           134. The City’s second justification is that “if a community benefit – like any  
15 change to the project – would have the potential for new or substantially increased  
16 significant environmental impacts, subsequent/supplemental CEQA review would be  
17 required pursuant to CEQA Guidelines Sections 15162 through 15164.” (Appeal  
18 Response #5, p. 10)

19           135. Severely undermining this contention, however, was the City Council’s  
20 separate action at its June 9, 2015 meeting (Ordinance No. 7,405-N.S, Consent Agenda  
21 Item #1) to approve a lease of a City-owned parking lot (Parcel No. 52-1528-15-4) to  
22 Habitot for a period of up to fifteen years at a cost of \$1 per year that is immediately  
23 adjacent to Habitot’s proposed new location at 3271 Adeline/1833 Alcatraz Avenue. As  
24 noted in the Consent Agenda item, this “building would provide an ideal home for  
25 Habitot, contingent on their ability to use the adjacent City-owned space as an outdoor  
26 play area for patrons.” It should also be noted that this location is outside of the area  
27 studied under the Downtown Plan EIR.  
28

1  
2 136. The goal of the CEQA process is to inform the public and decision makers  
3 about environmental effects early enough in the process so that they can make informed  
4 decisions. The purpose of CEQA is not to retroactively justify decisions already made as  
5 the City appears to be suggesting by its reliance on a supplemental EIR process. In the  
6 case of Habitot, the City Council has now twice made discretionary decisions (approval  
7 of a lease and allocation of \$250,000) without any environmental review.

8 137. Once again, contrary to the City's assertion that "The cash payments to City  
9 funds are not subject to CEQA as they are not associated with any specific project and  
10 would not in themselves result in physical impacts on the environment" (Appeal  
11 Response #5, p. 10) the City clearly knew not only the specific project but also its  
12 proposed physical location.

13 **SIXTEENTH CAUSE OF ACTION**

14 **THE EIR DID NOT ADDRESS COMPLIANCE WITH STATE**  
15 **PLANNING STANDARDS AS REQUIRED BY PUBLIC RESOURCES CODE**  
16 **SECTION 21094.55 AND GOVERNMENT CODE SECTION 65041.1**

17  
18 138. Petitioner incorporates all previous and subsequent paragraphs as if fully set  
19 forth.

20  
21 139. In order to implement Section 21094.5 (The "Infill EIR" process) upon which  
22 the City is relying, Public Resources Code 21094.55(b)(2) requires that: "The guidelines  
23 prepared [by the Office of Planning and Research] pursuant to this section shall include  
24 statewide standards for infill projects" to "promote all of the following" including "The  
25 state planning priorities specified in Section 65041.1 of the Government Code." Section  
26 65041.1(a) in turn requires that the state planning priorities "shall be...to promote infill  
27 development and equity by *rehabilitating, maintaining, and improving* existing  
28 infrastructure that supports infill development and *appropriate reuse and redevelopment*  
of previously developed, underutilized land that is presently served by transit, streets,

1 water, sewer, and other essential services, particularly in underserved areas, *and to*  
2 *preserving cultural and historic resources.*" (emphasis added). Nowhere in these criteria  
3 does the term "demolish" appear. Instead the emphasis is on "rehabilitating",  
4 "maintaining", "appropriate use" and most importantly "preserving cultural and historic  
5 resources."

6  
7 140. The City therefore cannot rely on the "Infill EIR" process to evaluate and  
8 justly projects that would demolish historic structures such as the 1913, 1926, and 1957  
9 additions to the Shattuck Hotel.

10 141. The requirement of Government Code Section 65041.1 was only recently  
11 added to the Public Resources Code through the adoption of SB226 (Stats. 2011, Ch. 469)  
12 and this requirement is unique solely to "infill EIRs." It is not statutorily required for any  
13 other EIR type (e.g. programmatic, project, etc.). It is a separate and different  
14 requirement from the existing CEQA requirement for historic resources (CEQA  
15 Guidelines 15064.5). Given its recent adoption, the Legislature, in approving SB226  
16 must have been aware of existing historic preservation standards (i.e. the pre-existing  
17 15064.5) and believed that further safeguards and/or review were appropriate.  
18 Compliance with this requirement therefore must be separately addressed, as the City did  
19 not do, as part of the "Infill EIR" process..

20 142. Therefore the City's reliance on the Infill EIR process is contrary to both the  
21 Public Resources Code requirements and state planning priorities and cannot be used as a  
22 vehicle to demolish cultural and historic resources

23  
24 **PRAYER FOR RELIEF**

25  
26 In each of the respects enumerated above, Respondent has violated its duties under  
27 law, abused its discretion, failed to proceed in the manner required by law, and decided  
28 the matters complained with erroneous, incomplete, or no evidence thus failing to meet

1  
2 CEQA requirements that the City's conclusions are supported by substantial evidence..  
3 Accordingly, the certification of the EIR and the approval of the Project must be set aside.

4  
5 WHEREFORE, Petitioner prays for relief as follows:

- 6 1. For an alternative and peremptory writ of mandate, commanding Respondent:
- 7 A. To set aside and vacate its certification of the EIR, Findings and Statement  
8 of Overriding Considerations supporting the Project;
- 9 B. To set aside and vacate any approvals for the Project based upon the EIR  
10 and Findings and Statement of Overriding Considerations supporting the Project,  
11 including, but not limited to, the BUSD side letter, applicant modifications Development  
12 Agreement, Specific Plan, and General Plan Amendments; and
- 13 C. To prepare and certify a legally adequate EIR for the Project so that  
14 Respondent will have a complete disclosure document before it, identify for the decision-  
15 makers and public the potential significant impacts of the Project, and enable it to  
16 formulate realistic and feasible alternatives and mitigation measures to avoid those  
17 impacts;
- 18 2. For an order enjoining Respondent and Real Parties in Interest from taking  
19 any action to construct any portion of the Project or to develop or alter the Project site in  
20 any way that could result in a significant adverse impact on the environment unless and  
21 until a lawful approval is obtained from Respondent after the preparation and  
22 consideration of an adequate EIR;
- 23 3. For costs of the suit;
- 24 4. For reasonable attorneys' fees; and
- 25  
26 5. For such other and further relief as the Court deems just and proper.

27 Respectfully Submitted,

28 DATE: January 14, 2016

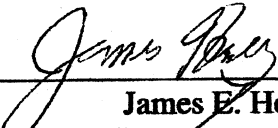
JAMES E. HENDRY

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**VERIFICATION**

I, James E. Hendry, as the Petitioner in this action have read the foregoing Petition for Writ of Mandate and know the contents thereof, and the same is true of my own knowledge.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 14th day of January 2016, in Berkeley, California.

  
\_\_\_\_\_  
James E. Hendry  
2043 Lincoln St.  
Berkeley, CA 94709  
(415) 867-9596  
[jameshendry@sbcglobal.net](mailto:jameshendry@sbcglobal.net)

**James E. Hendry**  
2043 Lincoln St.  
Berkeley, California 94709  
E-mail: [jameshendry@sbcglobal.net](mailto:jameshendry@sbcglobal.net)

January 14, 2016

*By U.S. Mail*

California Attorney General  
1515 Clay Street  
Oakland, California 94612-1499

Re: Challenge to Certification of Environmental Impact Report for 2211 Harold Way, Berkeley ,  
California Mixed Use Project

James E. Hendry v. City of Berkeley

Honorable Attorney General:

Please find enclosed a copy of the Petition for Writ of Mandate filed to challenge the City of Berkeley's certification of an environmental impact report and adoption of a statement of overriding considerations for the 2211 Harold Way Mixed Use Project. The Project authorizes the construction of a mixed use building up to 18 stories, 302 dwelling units, approximately 10,877 square feet of ground-floor commercial space, a six to ten cinema complex, approximately 641 seats and 177 underground parking spaces, located in Downtown Berkeley.

Petitioner believes the City's approval of the Project violates the California Environmental Quality Act (CEQA) because the EIR failed to address public transit and historical preservation issues. Additionally, the City violated CEQA procedurally, by prejudicial abuse of discretion, failing to proceed in a manner required by law, and adopting an EIR not based on substantial evidence among other concerns addressed in the writ..

Sincerely,

  
James E. Hendry

**Exhibit A**

Enclosure: Petition for Writ of Mandate

**James E. Hendry**  
2043 Lincoln St.  
Berkeley, California 94709  
E-mail: [jameshendry@sbcglobal.net](mailto:jameshendry@sbcglobal.net)

January 14, 2016

*By U.S. Mail*

Berkeley City Clerk  
2180 Milvia Street  
Berkeley, CA 94704

**Re: Challenge to Certification of Environmental Impact Report for 2211 Harold Way,  
Berkeley, California Mixed Use Project**

**James E. Hendry v. *City of Berkeley***

Honorable City Clerk:

Please take notice that Petitioner James E. Hendry will be filing a lawsuit to challenge the City of Berkeley's certification of an environmental impact report and adoption of overriding considerations for 2211 Harold Way mixed use Project. Petitioner believes the City's approvals violate the California Environmental Quality Act.

Sincerely,

James E. Hendry

**Cc: Eric Angstadt, Director of Planning; Carol Johnson, Land Use Planning Manager; Sally Zarnowitz, Staff Planner; Shannon Allen, Staff Planner; Zach Cowan, City Attorney; Rhoades Planning Group; HSR Berkeley Investments, LLC; John English**

Exhibit B

1 **Petitioner Pro Per**  
2 **James E. Hendry**  
3 **2043 Lincoln St.**  
4 **Berkeley, CA 94709**  
5 **415-867-9596**

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8  
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
10  
11 **FOR THE COUNTY OF ALAMEDA**

12  
13 **JAMES E. HENDRY**

14 **Petitioner,**

15 **vs.**

16  
17 **CITY OF BERKELEY,**

18 **HILL STREET REALTY, LLC.,**  
19 **JOSEPH PENNER,**  
20 **HSR BERKELEY INVESTMENTS, LLC**  
21 **RHOADES PLANNING GROUP. INC**  
22 **AND DOES I-X**

23 **Respondents.**  
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Case No.: [Number]

**NOTICE OF ELECTION TO  
PREPARE ADMINISTRATIVE  
RECORD (CALIFORNIA  
ENVIRONMENTAL QUALITY ACT)**

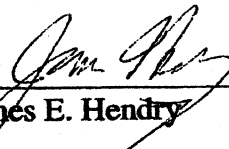


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**PLEASE TAKE NOTICE**

**Petitioner James E. Hendry hereby elects to prepare the administrative record in this matter.**

**Dated this 14<sup>th</sup> of January, 2016**

  
\_\_\_\_\_  
**James E. Hendry**